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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 700

F. S. GAMBRELL, ET AL.,
Appellants,

vs.

CHALK HILL THEATRE COMPANY, LTD., ET AL.,
Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEE WALTER STAEHELY'S OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM.

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APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEE WALTER STAEHELY'S OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM.

The appellee Walter Staehely respectfully submits this his opposing statement and motion to dismiss or affirm, as is provided by Rule 12, Paragraph 3, of the Rules of the Supreme Court, and says:

Preliminary Statement

The facts are undisputed. Those recited in appellants' petition for appeal are not, however, all of the relevant facts, for this is not a case where appellants' property has

been left in a cul de sac by the closing of a street or one where appellants, as abutting owners, have been denied reasonable ingress and egress to their property or otherwise suffered special damage.

Walter Staehely was on February 28, 1946, the owner of all land on both sides of Guadalupe Street, in Northfield Annex No. 2, both as originally platted and as resubdivided. Simultaneously with the vacation of the original plat of Northfield Annex No. 2, a subdivision in the City of Austin, Staehely prepared and presented to the City Plan Commission of the City of Austin an amended plat of Northfield Annex No. 2, which was approved by said Commission on February 28, 1946. The City of Austin is a Home Rule City, having all of the rights, privileges, powers, and immunities conferred upon such a city by Article XI, Section 5, Constitution of Texas, and Article 1175, Revised Civil Statutes of Texas. Acting as such, the City Council of the City of Austin, by an ordinance dated and passed February 28, 1946, vacated the original plat of Northfield Annex No. 2 and vacated, abandoned, and closed all streets, avenues, utility easements, and other public places within said subdivision as originally platted.

By an endorsement on the face of the plat of the resubdivision of Northfield Annex No. 2, this appellee dedicated to public use the streets shown on such plat. By such resubdivision of said Northfield Annex No. 2 and the dedication appearing thereon, no change whatever was made in the location of either Lot No. 14 or Lot No. 15, in Block No. 1, in Northfield Annex No. 2, or in any of the lines of either of such lots, or in the location of the street upon which such lots abut, and each of said lots has the identical location on both plats of said Northfield Annex No. 2.

The resubdivision of Northfield Annex No. 2 has had the effect of changing the course of Guadalupe Street from

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the point of its intersection with the North line of Nelray Boulevard in a Northerly direction, and 55th, 55½, and 56th Streets were shortened somewhat, but neither the appellants nor said Lots Nos. 14 and 15, in Block No. 1, in Northfield Annex No. 2, were otherwise affected.

The position of Nelray Boulevard, both as to width and length, is identical on both the original plat and on the resubdivision of Northfield Annex No. 2. The two lots in question, both as originally platted and as resubdivided, abut on Nelray Boulevard and on no other street or alley.

Any reference to alleys in Northfield Annex No. 2 is erroneous. There are no alleys shown on either of the plats to which reference has been made.

Summary Statement of Appellee Walter Staehely's Contentions

1. Jurisdiction of the Supreme Court of the United States cannot be sustained in this case on the ground that the decision complained of sustains the validity of a city ordinance, for the ordinance here involved was by the State court assumed to be void, and the holding of that court is not predicated to any extent upon the validity of such ordinance.

2. The Supreme Court of the United States is without jurisdiction to entertain this appeal for the reason that there was not drawn in question in the State court the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

3. The Supreme Court of the United States is without jurisdiction to entertain this appeal, because the record in this case fails affirmatively to show that there was drawn in question in the State court the validity of Article 4646a,

Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

4. The Supreme Court of the United States is without jurisdiction to entertain this appeal, because it does not appear from the record in this case that any Federal question was expressly or necessarily decided by the State court.

5. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas rests upon an adequate and substantial non-Federal ground, to wit, that appellants were not entitled to injunctive relief because of their failure to allege any special damage.

6. No question of a Federal nature is presented by this appeal, because there has not been any "taking" of appellants' property within the meaning of either the Fourteenth Amendment to the Constitution of the United States or Article I, Sections 17 and 19, of the Constitution of Texas.

7. No substantial Federal question is presented by this appeal, because Article 4646a, Revised Civil Statutes of Texas, the validity of which was sustained by the Court of Civil Appeals, merely deprives appellants of the remedy of injunction and does not take from them their right to recover such damages, if any, as they may have sustained.

I

Jurisdiction of the Supreme Court of the United States cannot be sustained in this case on the ground that the decision complained of sustains the validity of a city ordinance, for the ordinance here involved was by the State court assumed to be void, and the holding of that court is not predicated to any extent upon the validity of such ordinance.

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In their statement as to jurisdiction on appeal, the appellants say:

> "The decision complained of here sustains • • • the validity of a city ordinance."

They point out that an ordinance is to be treated as if it were a statute, which is conceded; but appellants fall into error in saying that the ordinance was found valid. From the opinion of the Court of Civil Appeals, we quote:

> "So, for the purpose of this opinion, we assume the truth of appellants' allegations that the ordinance was passed for a private and not a public purpose, and that the ordinance is void."

It would be surplusage to belabor the point; it simply is not in the case.

II

The Supreme Court of the United States is without jurisdiction to entertain this appeal for the reason that there was not drawn in question in the State court the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

The Supreme Court of the United States is without jurisdiction to entertain this appeal, because the record in this case fails affirmatively to show that there was drawn in question in the State court the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States.

The Supreme Court of the United States is without jurisdiction to entertain this appeal, because it does not appear from the record in this case that any Federal question was expressly or necessarily decided by the State court.

Citation of authority is hardly necessary in support of the proposition that it is essential to the jurisdiction of the

Supreme Court on appeal that there has been an explicit and timely insistence in the State court that a State statute, as applied, is repugnant to the Federal constitution. *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 65 Sup. Ct. 624 (1945); *Citizens National Bank* v. *Durr*, 257 U. S. 99, 42 Sup. Ct. 15 (1921); *Wall* v. *Chesapeake & O. R. R.*, 256 U. S. 125, 41 Sup. Ct. 402 (1921). A Federal question is not to be considered when it has not been raised in the State court or considered there. *Wilson* v. *Cook*, 327 U. S. 474, 66 Sup. Ct. 663 (1946); *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 62 Sup. Ct. 857 (1942); *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 57 Sup. Ct. 466 (1937).

It is clearly demonstrable that appellants have not set up the essential Federal question in the State court at a proper time or in a proper manner. It is equally clear that no such question was presented to or decided by the courts of Texas. Brief references to the record will sustain both of those assertions.

There are but two allegations in appellants' pleadings in which reference is made to a taking of their property without due process of law. We quote each of them below:

> From paragraph VI: "To close and vacate said streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law."
>
> From paragraph IX: "The said defendant Walter Staehely by filing his purported vacation of the subdivision set out and described above, has cast upon the title to the property owned by plaintiffs a cloud which in effect is a taking of plaintiffs' property without due process of law."

Their pleadings are bare of any mention of the Fourteenth Amendment to the Constitution of the United States.

This case having been tried before the court without the

intervention of a jury, no motion for a new trial was required to be filed. Rule 324, Texas Rules of Civil Procedure. That being true, Rule 374, Texas Rules of Civil Procedure, was applicable. It provides that "Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary."

Had appellants wished to complain of the action of the trial court on the ground that they have been deprived of the rights guaranteed them by the Fourteenth Amendment they were free to include such complaint in their brief on appeal. That they wholly failed to do, but they did assert, as their Point Three, the following proposition:

> "Error of the court in not holding that if Article 4646a, R. C. S., is construed to prevent a person who acquires a private easement by purchase of property with specific reference to a dedication and map from securing an injunction to prevent another person from physically closing such easement, then it is in violation of Article I, Sec. 19, Constitution of Texas."

After the Court of Civil Appeals had affirmed the trial court's judgment, appellants filed their motion for rehearing, in which error was assigned as to the failure of the Court of Civil Appeals to sustain the above quoted Point Three.

Appellants' motion for rehearing having been overruled by the Court of Civil Appeals, they applied to the Supreme Court of Texas for a writ of error and in such application urged as their Point Four the following:

> "The Court of Civil Appeals erred in holding, in effect, that Article 4646a, V. A. C. S., does not violate

> Article 1, Secs. 17 and 19, Constitution of Texas, even if it is construed to prevent injunctive relief as a protection against the destruction of vested private property rights without compensation to the owner."

That application was also overruled in due time, and the judgment herein became final.

At no stage of the proceedings, up to and including the denial of appellants' application for a writ of error, was there any mention made by them of the Fourteenth Amendment to the Constitution of the United States, either expressly or by implication. Reliance was had solely on Article I, Secs. 17 and 19, Constitution of Texas. Insofar as is here material, those sections of the Texas Constitution provide:

> "Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . ."
>
> "Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

It should be emphasized that these provisions of the Constitution of Texas are substantially equivalent to the like guarantees contained in the Constitution of the United States.

Only the effect of the Constitution of Texas was considered by the Texas courts. Their rulings are final in this case, for, as aptly stated by Mr. Chief Justice Fuller, in *Miller* v. *Cornwall R. R.*, 168 U. S. 131, 18 Sup. Ct. 34 (1897), "We have no jurisdiction on a writ of error to a state

court to declare a state law void on account of its collision with a state constitution."

Decisive of the instant case is *Bowe* v. *Scott*, 233 U. S. 658, 34 Sup. Ct. 769 (1914), in which the facts were substantially identical to those now before the court. Shafer, a common source proprietor, had dedicated an alley to public use. Plaintiffs and defendants owned property abutting on that alley. Pursuant to authority conferred upon them by an ordinance of the City of Richmond, defendants closed that part of the alley abutting their property. An injunction was sought to restrain the enforcement of the ordinance and to prevent the defendants from obstructing passage through the alley. A demurrer was sustained on the ground, among others, that plaintiffs did not allege any special damage. The writ of error was dismissed by the Supreme Court. The holding will sufficiently appear from the following quotation from Mr. Chief Justice White's opinion:

> "The other passage in the bill is found in subdivision 'c' of the tenth paragraph, and is as follows: 'That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to said alley without due process of law.' But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 42 L. Ed. 409, 18 Sup. Ct. Rep. 34; *Harding* v. *Illinois*, 196 U. S. 78, 49 L. Ed. 394, 25 Sup. Ct. Rep. 176.
>
> "As from what we have said it results that there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this court, since such claims are so wholly unsubstantial and frivolous as to be devoid of any merit, it

follows that we have not jurisdiction, and the writ of error must be dismissed."

That case has been cited as authority in the following *per curiam* opinions of the Supreme Court: *Missouri* v. *Geiger*, 235 U. S. 694, 35 Sup. Ct. 208 (1914); *Caldwell* v. *Bauer*, 238 U. S. 607, 35 Sup. Ct. 602 (1914); *O'Brien* v. *Public Service Commission*, 251 U. S. 537, 40 Sup. Ct. 55 (1919); *Armour & Co.* v. *New York, New Haven & Hartford R. R.*, 250 U. S. 651, 40 Sup. Ct. 12 (1919); and *American Trust Co.* v. *McNinch*, 261 U. S. 606, 43 Sup. Ct. 363 (1922).

It will be recalled that here appellants at no time prior to filing their motion for rehearing in the Supreme Court of Texas directed the attention of the state courts to the Constitution of the United States or any portion of the same. But even a general allegation such as "This proceeding is in violation of the Constitution of the United States" would have been unavailing. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 22 Sup. Ct. 120 (1901), followed in *Harding* v. *Illinois*, 196 U. S. 78, 25 Sup. Ct. 176 (1904).

The foregoing authorities appear to be conclusive, but it may be advisable to advert briefly to two more grounds upon which this appeal should be dismissed for want of jurisdiction.

In their petition for appeal appellants quote from their motion for rehearing filed in the Supreme Court of Texas after their application for a writ of error had been overruled. *For the first time during the trial and the appeal of this case the Constitution of the United States was mentioned.* We submit that, for two reasons, appellants' case is not aided by the allegations so made originally in that motion.

In the first place, the motion for rehearing filed in the Texas Supreme Court is not a part of the record on this appeal, because appellants did not request its inclusion

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therein. In view of the familiar rule that jurisdiction of the Supreme Court of the United States is to be determined from the record, *Henneford* v. *Northern R. R.*, 303 U. S. 17, 58 Sup. Ct. 415 (1938), this case stands for decision as if no such motion for rehearing had ever been filed.

Secondly, even if the motion in question were a part of the record, appellants' case would not be helped. That is true because jurisdiction of the Supreme Court cannot be invoked by the assertion for the first time of a Federal question in such a motion for rehearing. Such was the express holding of the court in *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475 (1945), where it was said:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition."

Similar language is found in these additional cases:

Herndon v. *Georgia*, 295 U. S. 441, 55 Sup. Ct. 794 (1935):

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Citizens National Bank v. *Durr*, 257 U. S. 99, 42 Sup. Ct. 15 (1921):

> "After the final decision, in an application to the Supreme Court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered

the Ohio taxation statutes invalid because of such repugnance. This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this court."

Wall v. *Chesapeake & O. Ry.*, 256 U. S. 125, 41 Sup. Ct. 402 (1921):

"Our jurisdiction is invoked upon the theory that validity of the amending act was challenged below because of conflict with the federal Constitution. But the point was not raised prior to the petition to the Supreme Court for a rehearing which was overruled without more. 290 Ill. 227, 125 N. E. 20. It could have been presented earlier. According to the well-established rule we may not now consider it, and the writ of error must be dismissed. Godchaux Co. *v.* Estopinal, 251 U. S. 179, 40 Sup. Ct. 116, 64 L. Ed. 213."

Such is our case. Not until they filed their motion for a rehearing in the Supreme Court of Texas did appellants draw in question the validity of Article 4646a, Revised Civil Statutes of Texas, on the ground of its being repugnant to the Constitution of the United States. The Supreme Court of Texas simply overruled the motion for rehearing, without more. The Federal question was raised too late; the Supreme Court is without jurisdiction to consider it on this appeal.

III

The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas rests upon an adequate and substantial non-Federal ground, to wit, that appellants were not entitled to injunctive relief because of their failure to allege any special damage.

This is not a case, as appellants seek to imply, where *legal* relief has been denied for the invasion of their property rights. It is a case where both the trial court and the

Court of Civil Appeals has said that appellants are not entitled to *equitable* relief, and the Supreme Court of Texas has declined to take jurisdiction. Appellants have a remedy *at law*, if they have sustained damage; they do not have a remedy *in equity*.

Even if it be conceded that persons may acquire private easements in a street, either by virtue of their status as abutting owners or by reason of having purchased property with reference to a map or plat, the nature of the easement is the same, whether the owner thereof is an abutting owner or whether his purchase has been made from a common source proprietor with respect to a map or plat. *If there were a distinction to be made, it would have to be conceded that an abutting owner has greater rights to be protected than a remote owner who may have bought his property with reference to a map or plat.*

It was assumed by the Court of Civil Appeals, and we shall assume, that the ordinance of the City of Austin vacating, abandoning, and closing certain streets in Northfield Annex No. 2 was void. But the invalidity of an ordinance is not, in and of itself, sufficient to warrant the issuance of a writ of injunction. There must be an allegation, as well as proof, of special damage or injury. Such is one of the holdings of the Court of Civil Appeals, in support of which *Malott* v. *City of Brownsville*, 298 S. W. 540 (Tex. Com. App., 1927), was cited.

There Malott, an abutting property owner, sought to prevent by injunction the erection of a bridge across the Rio Grande River in such a manner as to obstruct the street upon which his property was located and asserted the invalidity of the city ordinance by virtue of which the street was being obstructed and the bridge was being erected. The court held:

> "It is unnecesary for us to pass upon the interesting question of the validity of the ordinance under which

defendant in error Creager proposes to erect the structures complained of. If it be true, as found by the Court of Civil Appeals, that plaintiff in error has shown no probable injury from the threatened structures, then clearly he is in no event entitled to an injunction. The law is very clear on this point. An injunction will never be granted unless it appears that injury will otherwise result to the applicant. Chisolm *v.* Adams, 71 Tex. 678, 10 S. W. 336. So that, if it be conceded the ordinance is void, nevertheless plaintiff in error must go further, and show that he is threatened with an irreparable injury by its attempted enforcement before he can possibly be entitled to the relief sought. Pac. Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

"In Boise, etc., Co. *v.* Boise City, 213 U. S. 276, 29 S. Ct. 426, 53 L. Ed. 796, the object of the bill was to obtain an injunction against the enforcement of an ordinance of the city. The Supreme Court, in denying the relief sought, said:

" 'It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.'

"Authorities to this effect abound wherever the principles of equity are administered. Such courts will never do a useless thing, and the excuse for resorting to the principles of equity at all is to supply a remedy for the prevention of an injury or wrong for which the law affords no adequate remedy.

"To warrant a recovery in a case like this, it must appear that the complainant has suffered, or will suffer, some special damage. The fact that the ordinance is void, if it is void, is not sufficient ground for enjoining its enforcement. Other circumstances bringing the case

> under some recognized head of equity jurisdiction must be shown. 32 C. J. p. 265, sec. 415."

It is true that in that case the court denied equitable relief, because plaintiff had failed to *prove* the special damage so "amply pleaded", but the principles announced in that decision are equally applicable where, as here, the appellants have failed to *plead* any special damage. To have been entitled to the remedy of injunction, they would have been obliged to allege that they were threatened with an irreparable injury by the enforcement of the ordinance vacating and closing the streets in question. Under the undisputed facts in this case, it is manifest that appellants have not and could not have made any such charge.

The only difference between the *Malott* case and the instant case is that there the complainant did not *prove* his right to injunctive relief; here such right is not *pleaded*. As said by the Court of Civil Appeals in its opinion, "Not only do appellants fail to allege any damage, general or special, they expressly decline to do so because the damages would be 'incapable of definite ascertainment.' It follows that the petition for injunction is not aided by the allegation that the ordinance is invalid."

The question, therefore, is one that has been resolved upon the ground that appellants' pleadings are not sufficient to entitle them to the relief for which they pray. Such a procedural matter is one for determination by the courts of Texas. That being an adequate and substantial ground for the holding of the Court of Civil Appeals, the Supreme Court of the United States should, under its well-established rule, either affirm or dismiss the appeal. *Honeyman* v. *Hannan*, 302 U. S. 375, 58 Sup. Ct. 273 (1937), wherein the court expressly held that "The Federal Constitution does not undertake to control the power of a State to determine by what process legal rights may be asserted

or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

IV

No question of a Federal nature is presented by this appeal, because there has not been any "taking" of appellants' property within the meaning of either the Fourteenth Amendment to the Constitution of the United States or Article I, Sections 17 and 19, of the Constitution of Texas.

No substantial federal question is presented by this appeal, because Article 4646a, Revised Civil Statutes of Texas, the validity of which was sustained by the Court of Civil Appeals, merely deprives appellants of the remedy of injunction and does not take from them their right to recover such damages, if any, as they may have sustained.

For the purposes of this statement, it may be assumed that appellants had acquired a private easement in the streets that were vacated, abandoned, and closed by the City of Austin and simultaneously relocated in such a way as not to interfere in any respect with the appellants or their property. While it is inconceivable that, under the undisputed facts, appellants can have been damaged to any extent, if it be conceded that they have sustained damages, what is their remedy for the assumed impairment of their private easement?

Prior to the enactment of Article 4646a, Revised Civil Statutes of Texas, the Texas decisions on the subject were far from harmonious. Appellants have cited cases which hold that injunction is a proper remedy in a case of this sort. Upon analysis, however, it will be found that in each of those cases the party granted *equitable* relief was either (1) an abutting owner or (2) showed some special damage

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not suffered by the public in general or (3) was able to prove that ingress and egress to his own property was less convenient.

From the opinion of the Court of Civil Appeals, we quote:

> "Without repeating the undisputed facts as shown by this record, we hold that no 'taking' of appellants' property, under Art. 1, Sec. 17, of our Constitution, is shown as there is no physical invasion or appropriation of appellants' property. Duvall *v.* City of Dallas, 27 S. W. (2d) 1105 (Ct. Civ. App. Writ Ref.); Johnson *v.* Lancaster, 266 S. W. 565 (Ct. Civ. App.); Kahn *v.* City of Houston, 48 S. W. (2d) 595 (Com. of App.)."

There can be no federal question in this case unless, under the undisputed facts shown by the record, there has been a "taking" within the purview of the pertinent constitutional provisions. The appellants have assumed that there has been a "taking" in this case. They have failed to distinguish between a "taking" and a "damaging." That distinction was made by the Supreme Court of Texas at an early date.

We refer to the case of *McCammon Lumber Co.* v. *Trinity & B. V. Ry.*, 104 Tex. 8, 133 S. W. 247 (1911). In that case the plaintiffs, as abutting owners, had fee simple title to certain land over which the street ran and sought to restrain the construction of a railroad track over the same. They contended that the proposed use of the street would amount to a taking of their property without compensation first being paid. The court said that the case necessarily turned on the question of whether or not there was a threatened taking and made this distinction:

> "If such action will constitute a taking, the facts that it is without consent and that compensation has not been made render it unlawful, so that the property owner has the right to prevent it by injunction. If it will constitute only a damaging, the attempt is not

necessarily unlawful merely because compensation is not made in advance, and if equity will prevent it at all, it will do so only upon the showing of additional facts."

The distinction stated was recognized and applied in *Stevens* v. *City of Dublin*, 169 S. W. 188 (Ft. Worth Civ. App., 1914), in which the facts were quite similar to those before the court in the case at bar. The City of Dublin had passed an ordinance authorizing the school district to close a portion of College Street which extended between two blocks of land owned and used by the school district. It appeared that, while plaintiff's property did not abut on College Street, *he had purchased his land with reference to a map or plat showing College Street.* The court squarely *held* at page 190, that "where the complaining party owns property abutting on the street, but not upon that portion closed, the owner is remitted to an action for his damages, if any, as was held by the court below."

To the same effect are *Johnson* v. *Lancaster*, 266 S. W. 565 (Austin Civ. App., 1924), and *Duvall* v. *City of Dallas*, 27 S. W. (2d) 1105 (Dallas Civ. App., 1930).

Even since the passage of Article 4646a, Revised Civil Statutes of Texas, but without reference thereto, the Eastland Court of Civil Appeals has reached the same conclusion in *Shelton* v. *City of Abilene*, 80 S. W. (2d) 351 (Eastland Civ. App., 1935). The plaintiffs in that case had bought their property with reference to a map or plat of the City of Abilene, and they sought to enjoin the construction of an underpass, the effect of which would be to close one of the streets shown on such plat. The court *held* that where a party's only interest in land is that of a servitude, he is restricted to an action at law for damages and is not entitled to injunctive relief.

The City of Austin is a Home Rule City. As such, it has

"exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways, and boulevards," Article 1175(16), Revised Civil Statutes of Texas, and is empowered "to narrow, alter, widen or straighten any such streets, alleys, avenues, or boulevards, and to vacate and abandon and close any such streets, alleys, avenues or boulevards." Article 1175(18), Revised Civil Statutes of Texas. The appellants here contend that by virtue of their purchase of certain lots by reference to a recorded plat, they acquired a right in every street in Northfield Annex No. 2 dedicated to the public, and that they cannot be deprived of such right without their consent. To say the least, the right thus asserted is a broad one. The plat of Northfield Annex No. 2 contains 85 lots, and if the owner of each lot has acquired the right asserted by the appellants, then the authority conferred upon the City of Austin to close, vacate, and abandon streets is barren. The absurdity of appellants' claim is even more apparent when it is remembered that they do not abut upon the vacated portions of Guadalupe Street, or 55th, 55½, or 56th Streets, and have ample means of access to their property by the only street upon which their lots do abut.

As the court judicially knows, there are many cities and towns in Texas, especially in the Western portion of the State, where maps or plats of the entire corporate area were filed many years ago, and all subsequent sales and purchases have been made with reference to such maps or plats. What of those cities and towns? Can any property owner, even though he has sustained no special damage, harass the governing bodies by suits for injunction every time the course of a street is changed, or an alley is closed, or an underpass is constructed, or a park larger in size than a city block is proposed? To ask the question is to

answer it. *Courts of equity do not so hamper or impede progress by the issuance of writs at the behest of those who are only mischievous and who have not been damaged, irreparably or otherwise.*

Because no citizen has, or should have, the right to interfere with the planning and development of streets by governing bodies of cities in this State, the Legislature has seen fit to provide that the remedy of injunction is not available to restrain the vacation, abandonment, or closing of a city street. Article 4646a, Revised Statutes of Texas, was enacted in 1930 and is quoted below:

> "No injunction shall be granted to stay or prevent the vacating, abandonment, or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city.
>
> "Sec. 2. Provided that any person, who under existing laws has the right to enjoin a city from vacating, abandoning or closing any street or alley of such city and whose right to such injunction is denied by this Act, shall have the right to an action for damages for any injury that he may sustain by reason of the vacating, abandoning or closing of any street or alley by such city."

The effect of this law was considered by the Commission of Appeals of Texas in *Kahn* v. *City of Houston,* 48 S. W. (2d) 595 (Tex. Com. App., 1932). In an opinion adopted by the Supreme Court, it was said, at page 599, that "the holders of such private rights and easements still have their remedy, either by injunction, if an abutting owner;

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if not, for damages, as may be proper. The import of the decision in that case is stated by the writer of the article "Streets" in 39 Tex. Jur. 539, sec. 22, in this language:

> "Such persons (having private easements) still have their remedy by injunction, if abutting owners, or if not, for damages"

The appellants will doubtless argue that the *Kahn* case is not parallel to the case at bar, inasmuch as it does not appear from the report of that case that Kahn purchased his property with reference to any map or plat of any subdivision. We submit that such a position is untenable, for, as an abutting owner, Kahn had acquired the same right to a private easement that he would have acquired by virtue of a purchase made with reference to a map or plat.

Roberts v. *Shell Pipe Line Corp.*, 175 S. W. (2d) 106 (Waco Civ. App., 1943), is precisely parallel to the case here before the court. There the City of Colorado City had passed an ordinance finding "that the best interest of the City requires that (Watson Street) be closed to public traffic." Thereafter, the City executed quitclaim deeds to the area formerly included within such street. Shell Pipe Line Corporation acquired title thereto, and erected a fence across Watson Street. The City did not physically close the street and had no intention of so doing. The plaintiffs, claiming to be the owners of a private easement in the street that had been closed by virtue of being abutting landowners, sought a mandatory injunction commanding the City, Mitchell County, and Shell Pipe Line Corporation to reopen and maintain Watson Street as a public street.

The trial court denied injunctive relief, and such action was sustained upon appeal. Four grounds for affirming

the judgment of the court below are set out in the opinion, but only two of them are material here. We quote:

> "It is clear to us that appellants are not entitled to injunctive relief. (1) Article 4646a, Vernon's Annotated Revised Civil Statutes, provides in part: 'No injunction shall be granted to stay or prevent the vacating, abandonment, or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed * * *' Does the evidence show without dispute that the Shell Pipe Line Corporation built a fence across Watson Avenue at a point where plaintiffs' land actually abuts that part of Watson Avenue actually vacated, abandoned and closed? We think not." (p. 107)
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> "Moreover, it is well settled that ' * * * if there be available an adequate remedy at law in damages, equity will not intervene by injunctive relief.' Kahn *v.* City of Houston, 121 Tex. 293, 48 S. W. 2d 595, 599. See also Duvall *v.* City of Dallas, Texas Civ. App., 27 S. W. 2d 1105, writ ref." (p. 108)

On this branch of the case the Court of Civil Appeals has held only that Article 4646a, Revised Civil Statutes of Texas, forecloses a complainant from equitable relief as against the closing of a city street. Such a ruling deals with the equitable remedy alone. Appellants have not been deprived of their right to a ruling by a court of law upon their asserted cause of action. The question is one of procedure, and, as such, the courts of Texas are empowered to determine the proper procedure in a case of this character so long as appellants are not denied an opportunity to be heard.

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The constitutional guaranties of due process of law do not require that parties shall be entitled to any particular form of action or any particular method of procedure for the protection of rights or the redress of wrongs. The holdings of the Supreme Court of the United States to that effect are uniform. For example, in *Gibbes* v. *Zimmerman*, 290 U. S. 326, 54 Sup. Ct. 140 (1933), we find this language:

> "The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference, the appellant has no property in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

To the same effect is *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389, 16 Sup. Ct. 344 (1896), where it is said:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what legal process rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action, instead of by another."

See, also, *Hardware Dealers Mutual Fire Co.* v. *Glidden Co.*, 284 U. S. 151, 52 Sup. Ct. 69 (1931), where it is said "the procedure by which rights may be enforced and wrongs remedies is peculiarly a subject of State regulation and

control. * * * In the exercise of that power and to satisfy the public need, a State may choose the remedy best adapted in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

The Legislature of Texas has, in the exercise of its judgment, seen fit to deprive its citizens of the remedy of injunction for the prevention of the closing of city streets. Individual interests have been subordinated to the public good. We submit that the statute represents a proper exercise of the police power, for persons damaged by the closing of a street still have their remedy for the collection of such damages as they may have sustained by an action at law. No rights have been taken from them; they have been denied only the equitable remedy of injunction.

Prayer

Wherefore, the appellee Walter Staehely respectfully prays that the appeal be dismissed or that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas be affirmed upon this motion.

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